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No. 92-1463

In The

Supreme Court of the United States

October Term, 1992

NUGGET HYDROELECTRIC, L.P.,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TERRY J. HOULIHAN*
RAYMOND C. MARSHALL
PATRICK C. COOPER
CHRISTOPHER VAN GUNDY
McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

DOUGLAS A. OGLESBY
RANDALL J. LITTENEKER
77 Beale Street
San Francisco, CA 94106

Attorneys for Respondent Pacific Gas and Electric Company

April 9, 1993

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

The petition for certiorari misstates the questions presented by this case. If the Court were to grant certiorari, the questions presented would be:

1. Did PG&E, a California utility, "willfully" monopolize the "sale and/or distribution" of electric power in northern California in violation of Sherman Act Section 2 by initially misleading Nugget, a limited partnership formed solely to develop three small hydroelectric projects, about project interconnection costs to prevent Nugget from selling their entire output to PG&E under thirty-year contracts without which the projects were not economically viable?

2. Is a RICO section 1962(a) claim stated where the plaintiff alleges injury from "predicate acts" but not that such acts generated income for the defendant nor that use of such income injured plaintiff?

3. Did the federal magistrate acting as discovery master abuse his discretion by imposing sanctions on a party for filing a duplicative discovery motion intended to harass, delay and increase the cost of litigation?

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BRIEF OF RESPONDENT PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Pacific Gas and Electric Company ("PG&E")[1] opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

[1] PG&E certifies pursuant to Sup. Ct. R. 29.1 that no parent or subsidiary of PG&E exists, other than wholly-owned subsidiaries.

INTRODUCTION

This case is merely an attempt to turn a commercial contract dispute into an antitrust and RICO case. Sophisticated corporate investors attempted unsuccessfully to take advantage of three standardized contracts imposed on PG&E by regulation. They failed. The issues arising from the petition do not warrant this Court's attention.

STATUTES AND RULES INVOLVED

With the following addition, the statutory provisions and rules cited by Nugget are adequate:

18 U.S.C. Section 1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Supreme Court Rule 10:

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

STATEMENT OF THE CASE

The facts relating to the dispute are derived from pleadings of Nugget Hydroelectric, L.P. ("Nugget"), the Petitioner in this Court. In granting PG&E's motions to dismiss and for judgment on the pleadings, the district

court accepted the allegations of the complaint and Nugget's RICO Statement as true.[2]

A. Facts alleged.

With the following additions and clarifications, Nugget's statement of the facts is adequate:

No construction ever commenced on any project; Nugget never secured the state and federal permits necessary for construction to proceed. Complaint at ¶¶ 25 and 28.

Nugget's characterization of facts relating to the PG&E interconnection estimates claimed to constitute fraud is misleading. PG&E did not simply represent to Nugget in August 1988 that a particular interconnection point "was preferable and would cost Petitioner an estimated $260,000 to $270,000." Petition ("Pet.") at 6.

Rather, the complaint alleges that PG&E "agreed that Nugget's proposed new interconnection [which was selected by Nugget's attorney] represented the 'preferable location' " to an alternate suggested by Nugget's consultant. Complaint at ¶ 35. PG&E had earlier suggested a third alternative. The complaint also states that

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[2] A RICO Statement is sometimes required by a court "where the pleader is so obviously in need of a roadmap if he or she hopes to state a potentially viable RICO claim." *Stich v. Lucas*, 1990 U.S. Dist. LEXIS 7453 at 5 (N.D. Ill. 1990). For the purposes of a motion to dismiss or motion for judgment on the pleadings, a RICO Statement operates as a pleading. *Greek Radio Network of America v. Vlasopoulos*, 731 F. Supp. 1227, 1234 n.12 (E.D. Pa. 1990).

PG&E "indicated that the new interconnection point [suggested by Nugget's attorney] would require a switch, which might increase total interconnection costs to $550,000.00." *Id.* at ¶ 36. It further alleges that PG&E informed Nugget that the estimate cost could be reduced to between $260,000 and $270,000 *if* "Nugget could procure a refurbished switch. . . . " *Id.* The higher formal estimate supplied later by PG&E of approximately $825,000 is not alleged to have assumed any contribution of equipment by Nugget and is not alleged to have been inaccurate.

Nugget implies that its lender, Credit Suisse, withdrew its financial support because of PG&E's interconnection study. The complaint, however, has only a vague allegation attributing the financing withdrawal generally to all actions by PG&E, including its refusal to extend, on a *force majeure* theory, the five-year deadline for construction of the projects. That refusal alone, not challenged here, rendered the projects uneconomic regardless of interconnection cost:

> No electric utility other than PG&E or other substantial purchaser of electric power maintains facilities within sufficient proximity to any of the projects to afford an alternate market for the electricity to be generated by them.

Complaint at ¶ 13.[3]

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[3] Both the District Court and the Ninth Circuit held that PG&E decisions on whether to grant extensions to the five-year construction deadline in Standard Offer No. 4 contracts was regulated by the California Public Utilities Commission ("CPUC") and protected from antitrust challenge by the *Parker*

The Nugget projects were uneconomic, incapable of survival in a competitive market. The contract price set by regulation "more than five years ago . . . substantially exceeds PG&E's current 'avoided cost,' which would otherwise determine the energy price." Complaint at ¶ 11. As the California Public Utilities Commission ("CPUC") observed with respect to delayed projects like Nugget's:

> from a resource planning perspective, the ratepayer would prefer terminating the failed project. The utility would then pursue negotiations with another resource (including QFs) at prices and terms that reflect the current resource planning realities.

Re Power Purchase Contracts Between Electric Utilities and Qualifying Facilities, 29 C.P.U.C. 2d at 426.

B. Proceedings below.

With the following additions and clarifications, Nugget's statement regarding the proceedings below is adequate:

The district court dismissed Nugget's Section 1962(a) RICO claim for failure to plead facts showing 1) the requisite "pattern of racketeering," 2) that defendant derived income from the predicate acts or 3) that Nugget had been injured by the predicate RICO acts. Petitioner's Appendix ("Pet. App.") at A-30. In its opinion affirming

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v. Brown doctrine. *Nugget Hydroelectric v. Pacific Gas & Elec.*, 981 F.2d 429, 434-35 (9th Cir. 1992). Pertinent CPUC Guidelines are set forth in *Re Power Purchase Contracts Between Electric Utilities and Qualifying Facilities*, Decision 88-10-032, 29 C.P.U.C. 2d 415, 440-41 (1988).

the dismissal of Nugget's Section 1962(a) claim, the Ninth Circuit considered only the narrower question of whether Nugget was required to and did in fact plead that it had been injured by the use of racketeering income. It apparently did not find it necessary to address the other 1962(a) pleading defects ruled on by the district court.

With respect to the magistrate's order imposing sanctions on Nugget's counsel, Nugget never filed a request for review or reconsideration by the district judge of the magistrate's order denying its first motion to compel. Under Local Rule 410-2 of the United States District Court for the Northern District of California, such a motion must be filed within ten days of a magistrate's ruling.

In denying Nugget's second motion to compel production of essentially the same massive group of documents and imposing sanctions, the magistrate concluded that Nugget's claim of recent discovery of new evidence was pretextual:

> The factual evidence presented by NUGGET does not offer evidence of any unlawful conduct by PG&E related to private power companies, much less evidence of any fraud similar to that alleged by NUGGET. Nor is the evidence offered new. Much of it comes from magazine articles published in 1986 and 1987.

Pet. App. at A-36. Under the circumstances, "[t]he only possible purpose which the court can discern for such an action [Nugget's second motion to compel] is harassment, delay and increasing the cost of litigation." Pet. App. at A-37.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. The antitrust claim presents neither an issue on which the circuit courts are split nor an important federal question. The Ninth Circuit's ruling on this issue turned on allegations of the complaint specific to Nugget. Moreover, the ruling was correct and needs no further review.

2. Nugget's RICO claim was riddled with flaws. Resolution of the issue decided by the Ninth Circuit would not be determinative of the district court's dismissal. Therefore, this case does not present the issue framed in a "meaningful litigation" context and review would be inappropriate for that reason. Any conflict in the circuit courts is being resolved by the emergence of a clear majority rule. Moreover, the ruling was correct and needs no further review.

3. The discovery magistrate's order imposing sanctions for discovery abuse was purely factual, involved no conflict among the circuits or important federal question and hence is not appropriate for review. Moreover, the ruling was correct and needs no further review.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO ANTITRUST ISSUE ON WHICH THE CIRCUITS ARE SPLIT, NO IMPORTANT QUESTION OF LAW, AND IS CONSISTENT WITH ESTABLISHED ANTITRUST DOCTRINE.

A. The Antitrust Ruling Presents No Important Question.

Nugget has not supplied convincing reasons why this Court should review the antitrust issue it seeks to

present. The circuit courts are not split on it and the issue is neither important nor as broad as petitioner would make it.

Nugget's formulation of the antitrust issue implies that the Ninth Circuit has ruled that no public utility can be liable under Section 2 of the Sherman Antitrust Act, 15 U.S.C. Section 2, to private power producers because "they are not competitors." Pet. at 10. The Ninth Circuit made no such pronouncement. Rather, it ruled, based on the specific factual allegations of Nugget's complaint, that *Nugget* was not a competitor of *PG&E*. The Ninth Circuit explained that, although Nugget argued that "it could have generated and sold power in interstate commerce in competition with PG&E," its "complaint alleges instead that Nugget planned to be a supplier to PG&E." *Nugget Hydroelectric v. Pacific Gas & Elec.*, 981 F.2d 429, 436 (9th Cir. 1992). Indeed, in both the complaint and in argument below, Nugget asserted that the sale of all project output to PG&E was the only economically viable alternative. Complaint at ¶ 13; Ninth Circuit Brief For Appellant at 23. Even its formulation of the question for review characterizes the wrongful act as "predatory conduct to prevent the developer from *complying with a power purchase agreement* . . . . " Pet. at i (emphasis added).

This ruling by the Ninth Circuit presents no "important" question of broad application. It affects and is of interest only to the parties. *See* Sup. Ct. R. 10; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari dismissed as improvidently granted because Court does not sit for the benefit of particular litigants) (Frankfurter, J.); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) ("it is very important that we be

consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties . . . "). Since the Ninth Circuit's ruling on Nugget's antitrust claims turned solely on allegations in Nugget's complaint specific to it, the Ninth Circuit's ruling is of limited importance. It should not be reviewed by this Court.

B. The Antitrust Ruling Was Correct and Presents No Unsettled Issue.

Under this Court's decisions, it is well established that "willful acquisition or maintenance" of a monopoly is an essential element of monopolization in violation of Sherman Act § 2. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The Ninth Circuit found that Nugget failed to plead this key element and thus affirmed the district court's dismissal of the antitrust claims. Specifically, the appellate court ruled that, because Nugget alleged in its complaint that it was committed to be a long term (30 year) supplier to PG&E, no monopolization claim was stated. The demise of a contractually committed supplier of electric power, as opposed to a competitor, would not enhance PG&E's monopoly power over the sale and distribution of electric power. 981 F.2d at 436.

There is nothing remarkable about such a ruling. Every regulated utility makes frequent decisions as to whether it will purchase energy from various suppliers. A decision not to do so may have the effect of excluding that supplier from the regulated company's "market." Such decisions, however, do not affect the "monopoly

power" of the utility, which still "controls" the distribution and resale of the power, subject of course to rate regulation. And, as here, even the purchasing decisions are frequently subject to review by a regulatory agency. *Id.* at 435. As one court put it, a private power project like Nugget's may "produce a component which is used by public utilities and consume utility service; but they are *not competitors* of public utilities." *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1373 (N.D. Ga. 1986) (emphasis added), *aff'd*, 844 F.2d 1538 (11th Cir. 1988).

Moreover, this Court has ruled in recent years that exclusionary conduct by a monopolist cannot be evaluated solely on the basis of its impact on the excluded business, even where, unlike here, that business is a rival. As stated in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985):

> [I]t is relevant to consider [the exclusion's] impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.[32] If a firm has been "attempting to exclude rivals on some basis other than efficiency,"[33] it is fair to characterize its behavior as predatory.

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[32] "Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." 3 P. Areeda & D. Turner, Antitrust Law 78 (1978).

[33] Bork 138.

The Court reiterated that the focus of Section 2 is competition and not individual businesses in *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1993):

> The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. . . . The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics.

113 S. Ct. at 891-2.

Nugget's complaint about PG&E's interconnection cost estimates is merely an element of its fundamental argument that PG&E managed to avoid buying power from Nugget's projects. Whether that alleged objective was achieved by a refusal to extend the contract's construction deadline or by artificially inflating the interconnection costs or both, the result is the same. Since Nugget alieged that it was contractually committed to sell the power to PG&E for 30 years, Complaint at ¶ 10, and had no alternative market, Complaint at ¶ 13, there was no adverse impact on competition resulting from Nugget's demise.

PG&E's actions were also "efficient" and served consumer interests. Nugget's projects would never have been built in an unregulated, competitive market. Their cost

was too high. Nugget specifically alleged that their energy cost was substantially above PG&E's avoided cost. Complaint at ¶ 11. Had they been competitively priced, PG&E would have been willing to purchase the power. As Nugget acknowledges, "PG&E offered a deferral of the power delivery deadline if Nugget would agree to certain price concessions . . . which would have rendered the projects economically unviable. . . . " Pet. at 5. Raising the possibility of price concessions was called for by the CPUC Guidelines. *Re Power Purchase Contracts Between Electric Utilities and Qualifying Facilities*, 29 C.P.U.C. 2d at 440 ¶ I.1.[4]

Nugget argues that the Ninth Circuit erroneously rejected Nugget's "allegation" that it was a competitor of PG&E because it could have sold electricity in competition with PG&E by having power "wheeled" to others. Pet. at 10-11. However, *nowhere in its complaint* did Nugget allege this. To the contrary, the complaint made clear that if the power purchase agreements had been fulfilled by Nugget and the projects completed, their full output would have been committed to PG&E for 30 years. Complaint at ¶ 10.

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[4] For the same reason its monopolization claim fails, so too does Nugget's attempted monopolization claim. This Court's recent *Spectrum Sports* decision held that an attempted monopolization claim is stated only if there is proof of a "dangerous probability of success" of monopolization. *Spectrum Sports*, 113 S. Ct. at 892. The Ninth Circuit properly concluded that, since Nugget pled no facts showing that the elimination of its projects had an effect on competition in the relevant market, it had not pled an attempt to monopolize.

Nugget's "wheeling" theory ignores both its contract and the fact that no one else would have purchased power from its uneconomic projects. The argument is based solely on Nugget's theoretical rights under PURPA to seek transmission from PG&E to another buyer. The complaint alleges neither that Nugget had other buyers nor that Nugget could economically do anything other than sell power to PG&E at the contract price. Complaint at ¶¶ 10, 13.[5]

II. PETITIONER'S RICO ISSUE IS ENTIRELY THEORETICAL; THIS CASE DOES NOT CLEARLY PRESENT IT.

Nugget has not set forth convincing reasons for review of its 18 U.S.C. § 1962(a) claim. This claim involves yet another question arising under the Racketeering Influenced and Corrupt Organizations Act ("RICO") in the context of civil business litigation. Review of the RICO issue Nugget has framed would be a

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[5] Nugget's argument that the Ninth Circuit improperly refused to consider an "alternative basis for Petitioner's status as a competitor of PG&E" not included in Nugget's opening brief presents no significant issue for review. Pet. at 11. The cases that Nugget cites reflect no dispute in the Circuits on the scope of their discretion not to consider new arguments first raised in a reply brief. *See In re Riverside-Linden Investment Co.*, 945 F.2d 320 (9th Cir. 1991) (cited in Pet. at 11, n. 6) (court refused to hear argument not raised in opening brief); *Picker International, Inc. v. Parten*, 935 F.2d 257 (11th Cir. 1991) (*id.*) (issue was substantially raised in opening brief); *Jackson v. University of Pittsburg*, 826 F.2d 230 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988) (*id.*) (court refused to hear argument not raised in opening brief).

theoretical exercise having no effect on the ultimate disposition of the litigation.

A. Because There Exist Other Grounds For Affirmance Not Addressed In The Petition, The RICO Issue Nugget Presents Is Entirely Theoretical.

This Court has not hesitated to deny review, even in cases of conflict among the circuits, where review of an issue would not necessarily affect the ultimate outcome of a case:

> [w]hile this Court decides questions of public importance, it decides them in the context of *meaningful litigation*. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the . . . [issue in conflict] can await a day when the issue is posed less abstractly.

Monrosa v. Carbon Black, Inc., 359 U.S. 180, 184 (1959) (emphasis added) (Court could decide case on other grounds). Nugget has framed an abstract, theoretical RICO issue whose resolution would not affect the ultimate outcome of the case.

The appeals court below ruled that Nugget failed to state a RICO claim pursuant to 18 U.S.C. Section 1962(a) because it did not allege injury from the use or investment of income derived from racketeering activity. 981 F.2d at 437-38. Nugget claims error by contending that it need only show injury from *racketeering acts* which subsequently generated income used in an enterprise, even if Nugget suffered no harm by the use of that income. Pet.

at 13. Even were the Court to decide this issue in Nugget's favor, the result of the lawsuit would be the same for at least two reasons.

First, the district court found that Nugget had also failed to plead a "pattern of racketeering." Pet. App. at 29-30. This is an essential element of any claim for relief under RICO. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240 (1989). Thus, should the Court grant the petition and find in Nugget's favor on the "use or investment" issue, Nugget would still be barred from relief.

This case does not clearly present the issue which Nugget has attempted to frame for a second reason. Nugget concedes that to state a Section 1962(a) claim, it must at least allege that PG&E *derived income* from the alleged racketeering acts, even though Nugget did not suffer injury from the use or investment of that income: "[t]he plain language of § 1962(a) provides only that the income derived from the racketeering activity be used subsequently in the operation of the enterprise." Pet. at 13. The district court reviewed Nugget's pleadings and concluded that Nugget had failed to allege this requisite element of Section 1962(a): "[t]here is no showing whatsoever that defendant derived income from any alleged actions against plaintiff." Pet. App. at A-30.

Nugget would have this Court decide a narrow RICO issue not likely to affect the outcome of this litigation. The issue is thus not presented in a "meaningful litigation" context which justifies certiorari review.

B. The "Conflict" Among The Circuits Is Being Resolved By The Emergence Of A Clear Majority Rule And Does Not Merit Review.

While the Ninth Circuit is in apparent disagreement with the Fourth, recent decisions indicate that the "split" in the circuits is being resolved by the emergence of a clear majority view. The "conflict" is nothing more than an aberrational rule in one circuit, the Fourth.

Nugget itself points out that of the five circuits that initially considered this issue, four – the Second, Third, Ninth and Tenth – disagreed with the Fourth Circuit's interpretation. *Compare Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990), *with Ouaknine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990); *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989); *Nugget Hydroelectric v. Pacific Gas & Elec.*, 981 F.2d 429 (9th Cir. 1992); *and Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). Considering all recent rulings, a total of eight circuits have now considered this question. *Seven* have squarely rejected the position taken by the Fourth Circuit and by Nugget. *See also Parke & Parsley Petroleum v. Dresser Industries*, 972 F.2d 580 (5th Cir. 1992); *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1992); *Danielson v. Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1229 (D.C. Cir. 1991).

Generally, review is provident where there exists a sufficiently sharp conflict among the circuits or a diversity of approaches in the lower courts. *H.J., Inc.*, 492 U.S. at 251 ("widest and most persistent circuit split on an issue of federal law in recent memory"); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 486 and nn. 5-6 (1985)

("variety of approaches taken by the lower courts"). Here, by contrast, the split is being resolved without this Court's intervention by the emergence of a clear (7-1) majority rule. Should the Fourth Circuit subsequently reaffirm its position in light of these other circuit decisions, perhaps such a case would warrant review by this Court. This Court has previously denied review of the issue posited by Nugget and should do so again. *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.) *cert. denied*, 493 U.S. 820 (1989).

C. The Ninth Circuit's Ruling Was Correct And Consistent With The Decisions Of This Court.

In any event, the position adopted by the Ninth and six other circuits regarding Nugget's Section 1962(a) claim is correct. Section 1964(c) provides a civil remedy for "[a]ny person injured in his business or property by reason of a violation of § 1962." To seek redress under Section 1964(c), a plaintiff must therefore allege that a violation of 1962(a) is the cause of the injury. In *Sedima*, this Court recognized that a RICO plaintiff has standing only if he has been injured in his business or property "by the conduct constituting the violation." *Id.* at 496. The rule adopted by the Ninth and six other circuits follows the logic of the language of section 1964(c) and the Court's language in *Sedima*.

The Ninth Circuit ruling is also consistent with the approach to interpreting RICO taken by this Court in *Reves v. Ernst & Young*, 61 U.S.L.W. 4207, 4209-11 (March 3, 1993). Interpretation begins with an examination of the statutory language. *Id.* at 4209; *see also Russello v. United*

States, 464 U.S. 16, 20 (1983). Section 1962(a) provides in pertinent part that:

> [i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise . . . .

Thus, one runs afoul of Section 1962(a) not by engaging in racketeering activity, but by using or investing income derived from such racketeering acts. To permit recovery under Section 1962(a) for injuries caused by acts of racketeering, as opposed to the use or investment of racketeering income, as Nugget contends, would permit recovery even though plaintiff was not injured "by reason of" a violation of Section 1962(a). Such a reading is not compatible with the plain language of the statute.[6]

In contrast, the Fourth Circuit has ruled that all a plaintiff need show was injury "by reason of" racketeering activity, "despite the fact that one element of the violation, the use of the proceeds, may not have contributed to or caused the injury." *Busby*, 896 F.2d at 837-38.

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[6] This reading of the language is consistent with this Court's reading of the legislative history of RICO. The Court noted in *Reves* that the consistently recognized purpose of 1962(a) was to prevent the *acquisition of an enterprise* through the use of funds derived from racketeering. 61 U.S.L.W. at 4210. Here there is no suggestion that income derived by PG&E was used in the acquisition of an enterprise.

The *Busby* decision thus contradicts the plain and unambiguous language of Section 1964(c). As the court below explained, the *Busby* decision:

> would allow an individual to recover for injuries caused by an action that does not constitute a violation of section 1962(a) even though section 1964(c) speaks not of an "element of a violation" but rather only of a "violation."

Nugget Hydroelectric, 981 F.2d at 437.

RICO's "liberal construction" clause, which explicitly lay behind the novel *Busby* rule, 896 F.2d at 838, is not a valid basis for that rule. In *Reves*, the Court rejected a similar argument that the liberal construction clause could be used to expand the scope of RICO beyond the statutory language. As the Court observed, the liberal construction clause:

> seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation. The clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one."

61 U.S.L.W. at 4211, *citing Sedima*, 473 U.S. at 492 n.10.

III. A MAGISTRATE'S FACTUAL DETERMINATIONS REGARDING DISCOVERY DO NOT WARRANT REVIEW.

Nugget also seeks review of sanctions which the discovery Magistrate imposed on Nugget for abusive and

duplicative discovery motions. Nugget would have the Court engage in an extensive fact-bound inquiry regarding Nugget's discovery abuses. The Court ordinarily denies review of decisions which turn solely on the particular facts involved. *Texas v. Mead*, 465 U.S. 1041 (1984).

The Magistrate denied Nugget's first motion to compel the production of literally millions of documents based on factual considerations. He found Nugget had failed to make "a *factual* showing that discovery into transactions unrelated to the RICO allegations contained in the complaint are reasonably calculated to lead to admissible evidence of *similar fraud*." *See* Order Re Discovery, filed January 10, 1991 at 6 (emphasis in original), *citing PMC, Inc. v. Ferro Corp.*, 131 F.R.D. 184, 187 (C.D. Cal. 1990).

Instead of seeking "reconsideration" of the Magistrate's order by the district judge, as prescribed by local rule 410-2, Nugget later filed a second motion – to compel production in response to a second set of document requests asking for virtually the same documents sought in the request just denied. *Id.*

The Magistrate denied discovery on these requests for several reasons, all of which involved factual determinations:

> [i]n effect it [Nugget] has attempted to re-litigate a previous motion, which it lost . . . the only possible purpose which the court can discern for such an action is harassment, delay and increasing the cost of litigation.

Pet. App. at A-37. Thus, the Magistrate sanctioned Nugget for filing a frivolous, duplicative motion to compel, virtually identical to one he previously denied. *Id.*

Because the two requests were substantially similar, the Magistrate also denied the second motion to compel for failure to comply with the reconsideration procedures of local rule 410-2. *Id.* Finally, the Magistrate mentioned that Nugget's failure to certify that it initiated a good-faith meet and confer conference to resolve the discovery dispute informally with opposing counsel pursuant to local rule 230-4 in both the first and second motions to compel constituted independent grounds to deny either motion. *Id.* The district court affirmed the Magistrate's findings. Pet. App. at A-38.

Nugget would draw this Court into deciding the foregoing factual issues, such as whether the second request for production was substantially similar to the first request and whether Nugget in fact complied with various local rules. Perhaps sensing this obstacle to review, Nugget also alleges that the Magistrate, as affirmed by the district court, improperly imposed sanctions where Nugget had found "new evidence" to justify the second request for production and second motion to compel. Pet. at 14. The Magistrate disagreed with Nugget's characterization of the facts: "the evidence offered is not new. Much of it comes from magazine articles published in 1986 and 1987." Pet. App. at A-36.

Moreover, Nugget misses the point. If this new evidence were indeed new, it was not necessary to seek "reconsideration" of the Magistrate's order in the district

court at all. Although Nugget was entitled to seek production of documents based on any new information, it was a factual determination for the Magistrate as to whether this evidence was indeed "new" or not.

This issue is manifestly not suitable for review. Nugget has unsuccessfully sought to dress up a factual dispute regarding discovery into a major federal question. PG&E submits that the foregoing discovery dispute between two private parties is of no importance to anyone other than the litigants.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit was consistent with the opinions of this Court, involves no important federal questions and is correct. To the extent the petition implicates an issue on which the circuits conflict, the petition does not so clearly present the issue as to warrant review. For these reasons the petition for a writ of certiorari should be denied.

Dated: April 9, 1993.

Respectfully submitted,

TERRY J. HOULIHAN*
RAYMOND C. MARSHALL
PATRICK C. COOPER
CHRISTOPHER VAN GUNDY
McCUTCHEN, DOYLE, BROWN
& ENERSEN

Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

DOUGLAS A. OGLESBY
RANDALL J. LITTENEKER
77 Beale Street
San Francisco, California 94106

Attorneys for Respondent
Pacific Gas and Electric
Company

*Counsel of Record